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NOTES

MANDAMUS IN MISSOURI: OLD STANDARDS AND NEW DEVELOPMENTS

I. INTRODUCTION

The classic description of the writ of mandamus depicts the writ as an order from a common law court to an inferior court, administrative officer or corporation to perform a duty imposed by law.¹ The origins of the writ of mandamus lie in the ancient practice of English sovereigns of commanding subjects to perform specific acts.² These commands were issued as letters missive without intervention of the courts.³ By the time of Edward I the procedure had developed to issue such royal commands through judicial writs addressed to specific persons.⁴ The writ issued from the court of King's Bench as an exercise of royal prerogative.⁵ By the end of the seventeenth century the writ of mandamus was in regular use⁶ in aid of the police power⁷ to effectuate justice where good government demanded a remedy.⁸ When the writ of mandamus was established in American jurisdictions, it lost its prerogative quality and became an extraordinary remedy issuing under standards similar to those developed by the English courts.⁹

II. PROCEDURE

Procedurally, Missouri courts have regarded mandamus as an action

1. J. HIGH, *EXTRAORDINARY LEGAL REMEDIES* 5 (3d ed. 1896). This particular formulation of the nature of mandamus is attributed to Blackstone, see 3 W. BLACKSTONE, *COMMENTARIES* *110.

2. S. MERRILL, *LAW OF MANDAMUS* 2 (1892). For a detailed and informative background on the early development of mandamus in England, see Weintraub, *ENGLISH ORIGINS OF JUDICIAL REVIEW BY PREROGATIVE WRIT: CERTIORARI AND MANDAMUS*, N.Y.L.F. 478 (1963).

3. J. HIGH, *supra* note 1, at 5. The original use of a "letter missive" was the royal instruction by letter to clerics ordering the selection of a named individual as a bishop.

4. F. FERRIS, *THE LAW OF EXTRAORDINARY REMEDIES* 219 (1926).

5. H. MOSES, *LAW OF MANDAMUS* 16 (1867).

6. S. MERRILL, *supra* note 2, at 2.

7. F. FERRIS, *supra* note 4, at 219.

8. H. MOSES, *supra* note 5, at 16.

9. J. HIGH, *supra* note 1, at 8-10.

at law¹⁰ issued in the court's sound discretion¹¹ in extraordinary situations.¹² The Missouri constitution empowers the supreme, appellate, and circuit courts to issue the extraordinary writ of mandamus.¹³ The technical procedures to obtain a writ of mandamus are specified in Missouri statutes¹⁴ and court rules.¹⁵ A proceeding in mandamus is instituted in the name of the state by an interested party (usually called the relator)¹⁶ to compel action by a named person (usually called the respondent)¹⁷ whose duty it is to perform the required act.¹⁸ Any private citizen and taxpayer may seek mandamus to enforce a public duty.¹⁹ When, however, performance of the duty is of special and

10. *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35 (Mo. 1969); *State ex rel. Walton v. Miller*, 297 S.W.2d 611 (Mo. App. 1956); *State ex rel. Kinneard v. County Court of Jackson County*, 17 S.W.2d 572 (Mo. App. 1929).

11. *State ex rel. Breshears v. Missouri State Employees Retirement Sys.*, 362 S.W.2d 571 (Mo. 1962); *State ex rel. Wells v. Mayfield*, 365 Mo. 238, 281 S.W.2d 9 (1955); *State ex rel. Fielder v. Kirkwood*, 345 Mo. 1089, 138 S.W.2d 1009 (1940).

12. *State ex rel. Horton v. Bourke*, 344 Mo. 826, 129 S.W.2d 866 (1939); *State ex rel. Dietz v. Carter*, 319 S.W.2d 56 (Mo. App. 1958); *State ex rel. Cook v. Kelly*, 142 S.W.2d 1091 (Mo. App. 1940).

13. Mo. CONST. art. 5, § 4 (as amended, 1970):

The supreme court, courts of appeals, and circuit courts . . . may issue and determine original remedial writs.

See also M. VOLZ, J. LOGAN, & C. BLACKMAR, 2 MISSOURI PRACTICE § 2067 (1961), for a discussion of the jurisdiction and venue of Missouri courts in issuing mandamus.

14. Mo. REV. STAT. §§ 529.010 to 529.100 (1969).

15. Mo. R. CIV. P. 84.20 to 84.25 contain the technical rules to obtain mandamus and Mo. R. CIV. P. 94.01 to 94.09 contain the rules governing the actual mandamus proceeding.

16. *England v. Eckley*, 330 S.W.2d 738 (Mo. 1959). The normal denomination of a mandamus case is *State ex rel.* (name of relator) v. (name of respondent). The typical petition in a mandamus action should present facts to show that the relator has a clear right to the alternative writ of mandamus. The relator should state the specific relief he is seeking. Unless the relator is seeking mandamus to protect the rights of the general public, the relator must show his special interest in the subject matter of the suit. The petition should allege prior demand by the relator and refusal to comply by the respondent. Finally, the relator should show that he has no other adequate remedy. *See* MOBARCLE, MISSOURI APPELLATE PRACTICE AND PLEADING & EXTRAORDINARY REMEDIES § 7.20 (1963); M. VOLZ, J. LOGAN & C. BLACKMAR, 2 MISSOURI PRACTICE § 2068 (1961).

17. *State ex rel. William R. Compton Co. v. Walter*, 324 Mo. 290, 23 S.W.2d 167 (1929). As a caveat it might be noted that the relator should join all necessary decision-makers or face possible dismissal, as occurred in *State ex rel. Kent v. Olenhouse*, 324 Mo. 49, 23 S.W.2d 83 (1929), where relator's case failed in part because only two members of a three-man board were joined.

18. Generally, however, mandamus will not lie against an officer after his term of office has expired, *State ex rel. United Bonding Co. v. Kennedy*, 364 S.W.2d 642 (Mo. App. 1963).

19. *State ex rel. Wear v. Francis*, 95 Mo. 44, 8 S.W. 1 (1888); *State ex rel. Lovell*

limited interest to the relator alone (as occurs frequently in a corporate context), a relator might be required to show a more personal, pecuniary stake in the situation.²⁰ A number of Missouri statutes make explicit provision for the availability of mandamus to compel performance of a duty in stated situations, but in most cases the courts determine the existence of a duty based on their analysis of the law.²¹

The relator bears the burden of proof in a hearing for mandamus.²² He must show the dereliction of a duty clearly imposed by law.²³ In all cases the relator must show present or future injury from respondent's failure to perform a duty.²⁴ Prior demand by the relator that the respondent perform his duty is not always required, but it is advisable that the relator make a demand and obtain refusal in order to avoid any difficulty in the hearing.²⁵ The relator should also try to specify as precisely as possible the acts required to fulfill respondent's duty.²⁶

v. Tinsley, 241 Mo. App. 690, 236 S.W.2d 24 (1951). See *State ex rel. Taylor v. Wade*, 360 Mo. 895, 231 S.W.2d 179 (1950), where the state attorney general, as relator, was held to be a proper party to enforce a duty to the public.

20. See *State ex rel. Johnson v. Sevier*, 339 Mo. 483, 489, 98 S.W.2d 677, 679 (1936); *State ex rel. Black v. Wilson*, 158 Mo. App. 105, 119, 139 S.W. 705, 709 (1911).

21. See, e.g., MO. REV. STAT. § 84.190 (1969) (mandamus may issue to compel St. Louis city officials to furnish adequate facilities for Board of Police Commissioners); § 99.180 (1969) (mandamus allowed to require performance of contracts with a municipal housing authority). For further examples of such statutes, see *MOBACLE*, *MISSOURI APPELLATE PRACTICE AND PLEADING & EXTRAORDINARY REMEDIES* § 7.7 (1963); M. VOLZ, J. LOGAN & C. BLACKMAR, 2 *MISSOURI PRACTICE* § 2062 (1961).

22. *State ex rel. Manchester Improvement Co. v. City of Winchester*, 400 S.W.2d 47 (Mo. 1966); *State ex rel. Mining v. Davis*, 391 S.W.2d 896 (Mo. 1965); *State ex rel. Benson v. City of St. Louis*, 136 S.W.2d 350 (Mo. App. 1940).

23. Cf. *State ex rel. Porter v. Hudson*, 226 Mo. 239, 126 S.W. 733 (1910) (mandamus will not lie to compel performance of an illegal act). See note 38 *infra* for a more complete listing of cases in direct support.

24. *State ex rel. Johnson v. Sevier*, 339 Mo. 483, 98 S.W.2d 677 (1936); *State ex rel. McGarry v. Kirkwood*, 423 S.W.2d 205 (Mo. App. 1967); *State ex rel. Black v. Wilson*, 158 Mo. App. 105, 139 S.W. 705 (1911). See *State ex rel. Weber v. Vossbrink*, 333 S.W.2d 298 (Mo. App. 1960) (mandamus will not issue where the matter is moot).

25. *State ex rel. Thompson v. Jones*, 328 Mo. 267, 41 S.W.2d 393 (1931) (prior demand unnecessary in the case of an important public duty). Cf. *State ex rel. Bluford v. Canada*, 348 Mo. 298, 153 S.W.2d 12 (1941) (prior demand required).

26. *State ex rel. Hart v. City of St. Louis*, 356 Mo. 820, 204 S.W.2d 234 (1947). But see *State ex rel. St. Louis County v. Kelly*, 377 S.W.2d 328, 332 (Mo. 1964), where the court to do justice in a case of great public importance amended relator's petition and writ on its own motion. For an interesting contrast on court leniency in judging the sufficiency of relator's petition and writ, compare *Yefremko v. Lauf*, 450 S.W.2d 462 (Mo. App. 1970) (court rejected prisoner's personal petition for mandamus due

Upon proper showing by the relator, the court may in its discretion²⁷ issue an alternative writ of mandamus ordering the respondent to perform the required act or to show cause why he should not.²⁸ Failure by the respondent to establish grounds for nonperformance will result in issuance of a peremptory writ of mandamus ordering respondent to comply.²⁹ A lower court's issuance of a peremptory writ, however, is appealable through ordinary judicial channels.³⁰

III. DEVELOPMENT OF THE WRIT IN MISSOURI

A. General Background on Missouri Standards

Missouri courts have delineated the scope of the writ of mandamus by repeated use of certain key standards.³¹ The foremost standard

to insufficient facts in pleadings), *with State ex rel. House v. White*, 429 S.W.2d 277 (Mo. App. 1968) (court issued mandamus, even though relator's petition inadequate, based on court's own analysis of the record).

27. *State ex rel. Phillip v. Public School Retirement Sys.*, 364 Mo. 395, 262 S.W.2d 569 (1954); *State ex rel. Coffman v. Crain*, 308 S.W.2d 451 (Mo. App. 1958); *State ex rel. Schulz v. Fogerty*, 195 S.W.2d 908 (Mo. App. 1946).

28. *State ex rel. Tate v. Sevier*, 334 Mo. 771, 68 S.W.2d 50 (1934); *State ex rel. University Park Bldg. Corp. v. Henry*, 376 S.W.2d 614 (Mo. App. 1964). *See also State ex rel. R-1 School Dist. of Putnam County v. Ewing*, 404 S.W.2d 433 (Mo. App. 1966), where the court held that a relator in a mandamus action is exposed to a counterclaim from respondent.

29. *State ex rel. Standefer v. England*, 328 S.W.2d 732 (Mo. App. 1959). *See also State ex rel. Kugler v. Tillatson*, 312 S.W.2d 753 (Mo. 1958), where the court allowed a supplemental writ of mandamus to issue.

30. *See State ex rel. House v. White*, 429 S.W.2d 277 (Mo. App. 1968). Most of the cases cited in this note are appellate court decisions reviewing issuance or denial of mandamus by a lower court.

31. For a background on traditional mandamus in Missouri up to 1950, see Note, *Extraordinary Writs in Missouri*, 19 U.K.C.L. REV. 173, 178 (1950). One Missouri statute, the Administrative Procedure Act, codifies some traditional mandamus doctrines in reviewing certain administrative decisions, Mo. REV. STAT. § 536.150 (1969):

1. When an administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person, including the denial or revocation of a license, and there is no other provision for judicial inquiry into or review of such decision, such decision may be reviewed by suit for . . . mandamus . . . and in any such review proceeding the court may determine the facts relevant to the question whether such person at the time of such decision was subject to such legal duty, or had such right, or was entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; but the court shall

in determining whether mandamus will lie against a judicial, administrative or corporate official is that the writ will issue to compel performance of a clear duty, usually articulated in the case of judicial and administrative officers as a "ministerial duty."³² The overwhelming majority of mandamus actions against corporate officers are resolved in terms of the presence or absence of a clear duty.³³ For mandamus actions against judicial and administrative officers, the courts utilize additional standards to determine availability of the writ. The general rule is that mandamus will not issue to control a discretionary decision of a judicial or administrative officer.³⁴ In only two exceptional circumstances will Missouri courts allow mandamus to control discretionary decisions of judicial or administrative officers—to compel exercise of discretion³⁵ or to correct an abuse of discretion characterized by bad faith, arbitrariness or capriciousness.³⁶ There are two additional standards which serve as an absolute bar to issuance of mandamus in all cases. The writ will not issue against either judicial, administrative or corporate officers if there is another adequate remedy or if relator's right to the writ is doubtful.³⁷ Thus, Missouri courts have three standards that support issuance of the writ; that is, mandamus to enforce a ministerial duty, to compel exercise of discretion, or to correct an abuse of discretion; and three standards which function to deny issuance of the writ; namely, no mandamus to control discretion, to aid a relator who has another adequate remedy, or to compel action where the right to the writ is doubtful. Each of these standards is explained individually in the discussion which follows.

not substitute its discretion for discretion legally vested in such administrative officer or body, and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative officer or body, such discretion lawfully exercised shall not be disturbed.

32. See, e.g., *State ex rel. Reorganized School Dist. No. 4 v. Holmes*, 360 Mo. 904, 231 S.W.2d 185 (1950); *State ex rel. Consolidated School Dist. C-4 v. Blackwell*, 254 S.W.2d 243 (Mo. App. 1952); *State ex rel. Dunbar v. Hohmann*, 248 S.W.2d 49 (Mo. App. 1952); *State ex rel. Folkers v. Welsch*, 235 Mo. App. 15, 124 S.W.2d 636 (1939). See notes 38-59 *infra* and accompanying text for further discussion.

33. See notes 50-59 *infra* and accompanying text for further discussion.

34. See notes 60-76 *infra* and accompanying text for further discussion.

35. See notes 77-84 *infra* and accompanying text for further discussion.

36. See notes 85-103 *infra* and accompanying text for further discussion. See also 26 WASH. U.L.Q. 135 (1940) for background on abuse of administrative discretion.

37. The "adequate remedy" doctrine is described in detail in notes 104-113 *infra* and accompanying text, and the "doubtful case" standard is covered in notes 114-120 *infra* and accompanying text.

B. *Mandamus to Compel Performance of a Clear Duty*

Missouri courts have made frequent application of the rule that mandamus will issue to compel a public officer to perform a clear ministerial duty.³⁸ A recent case reiterated a standard definition that "a ministerial act as applied to a public officer, is . . . an act or thing which he is required to perform by direction of legal authority upon a given state of facts, independent of what he may think of the propriety or impropriety of doing the act in the particular case"³⁹ When a respondent who is a public official admits in his pleadings that under the circumstances he could exercise his judgment in only one way, Missouri courts have treated the situation as a ministerial duty.⁴⁰ Typical cases in which mandamus has issued to compel a judicial officer to perform a ministerial duty include: ordering a trial court to grant intervention in the case of an absolute right;⁴¹ requiring a probate court to accept a person chosen by minors to serve as curator of their estate;⁴² and compelling a trial court to allow a prosecutor to file an information after an indictment has been held insufficient.⁴³ Representative of cases requiring an administrative official to perform a ministerial duty are the ordering of a village clerk to issue a building permit to a relator who had met all statutory requirements,⁴⁴ the requiring of a drainage district board to call an election meeting several years overdue⁴⁵ and the commanding of a school district to issue a diploma to a child with-

38. See, e.g., *State ex rel. Meyer v. Cobb*, 467 S.W.2d 854 (Mo. 1971); *State ex rel. Cole v. Matthews*, 274 S.W.2d 286 (Mo. 1954); *State ex rel. Heath v. New Madrid County*, 331 S.W.2d 289 (Mo. App. 1960); *State ex rel. Dahm v. Goodin*, 295 S.W.2d 600 (Mo. App. 1956); *Retirement Bd. of Police Retirement Sys. v. Kansas City*, 224 S.W.2d 623 (Mo. App. 1949).

39. *State ex rel. School Dist. No. 15 v. Baker*, 472 S.W.2d 865, 867 (Mo. App. 1971).

40. See *State ex rel. Floyd v. Philpot*, 364 Mo. 735, 266 S.W.2d 704 (1954); *State ex rel. McCleary v. Adcock*, 206 Mo. 550, 105 S.W. 270 (1907). Some observers have regarded this rule as an exception to the general rule that mandamus will not issue to control the discretion of judicial or administrative officers. See 26 WASH. U.L.Q. 134, 136 (1940). This perspective arises because the courts have sometimes phrased the "admitted in the pleadings" rule to say that "respondent could have exercised his discretion in but one way." This phraseology might well be a convoluted way of saying "ministerial duty" since a decision with but one discretionary possibility is a decision without choice, i.e., a ministerial duty.

41. *State ex rel. Aubuchon v. Jones*, 389 S.W.2d 854 (Mo. App. 1965).

42. *State ex rel. Pinger v. Reynolds*, 121 Mo. App. 699, 97 S.W. 650 (1906).

43. *State ex rel. Downs v. Kimberlin*, 364 Mo. 215, 260 S.W.2d 552 (1953).

44. *State ex rel. Great Lakes Pipe Line Co. v. Hendrickson*, 392 S.W.2d 481 (Mo. 1965).

45. *State ex rel. Byrd v. Knott*, 75 S.W.2d 86 (Mo. App. 1934).

out insistence that an unauthorized fee be paid.⁴⁶ Missouri courts have been quite generous in issuing mandamus to compel public officials to perform ministerial functions, often straining to define a duty as "ministerial."⁴⁷

Missouri courts show no such generous propensity in finding a clear legal duty for relators seeking mandamus against private corporations or individuals. Missouri courts very early in their history thwarted relator efforts to obtain mandamus against private individuals, on the rationale that the extraordinary writ will not issue against a person holding no official or quasi-official station, lest it become an instrument of oppression.⁴⁸ The Missouri courts will find a clear duty sufficient to justify mandamus against a private individual, other than an officer or director of a corporation, only where the individual is a former public or corporate officeholder who has sequestered important documents from his term of office.⁴⁹ Similarly, Missouri courts have refused with only one notable exception⁵⁰ to find a duty sufficient to justify issuance of mandamus against a voluntary association.⁵¹ With regard to issu-

46. *State ex rel. Roberts v. Wilson*, 221 Mo. App. 9, 297 S.W. 419 (1927). This case is also an illustration of the rule that mandamus in compelling proper action may rescind improper action. In this case the state constitution made free public education the right of every student. An impoverished school district sought to make money by charging a fee before students could receive their diplomas. Mandamus issued to compel performance of the ministerial duty to furnish free education and consequently had the effect of rescinding the improper policy.

47. An illustrative case is *State ex rel. Downs v. Kimberlin*, 364 Mo. 215, 260 S.W.2d 552 (1953), in which the court construed a statute with the wording "may be substituted" to read as if phrased to say an information "must be substituted" without trial court discretion. Hence, a ministerial duty for the lower court, rather than a discretionary power, was created in the appellate court's construction of the statute. For a suggestion that the allowance of mandamus to compel performance of ministerial duties by judicial and administrative officials and disallowance to control their discretionary decisions involve much arbitrary application of labels to do justice to the case, see Note, *The Use of Mandamus in Missouri*, 20 ST. LOUIS L. REV. 346, 354 (1935).

48. See *State ex rel. Lionberger v. Tolle*, 71 Mo. 645 (1880); *State ex rel. Cooper County v. Trent*, 58 Mo. 571 (1875).

49. See *State ex rel. R-1 School Dist. v. Ewing*, 404 S.W.2d 433 (Mo. App. 1966); *State ex rel. State Sav. Bldg. & Loan Ass'n v. Davis*, 54 Mo. App. 447 (1893).

50. See *Lysaght v. St. Louis Operative Stonemasons' Ass'n*, 55 Mo. App. 538 (1893), which held that relators who had property interest in membership in a benevolent association and were expelled without notice or a hearing had a clear right to mandamus to compel reinstatement. But see *State ex rel. Young v. Temperance Benevolent Ass'n*, 42 Mo. App. 485 (1890).

51. See *State ex rel. Cook v. Kelly*, 142 S.W.2d 1091 (Mo. App. 1940); *State ex rel. Schrempp v. Ancient Order of United Workmen*, 70 Mo. App. 456 (1897); *State ex rel. Young v. Temperance Benevolent Ass'n*, 42 Mo. App. 485 (1890). The

ance of mandamus against corporations, Missouri courts have found a quasi-public duty in certain specific and limited situations. The most frequent usage made of mandamus against corporations is to enforce the statutory or common law duty to make books and records available to stockholders.⁵² Even on this issue there is a split of authority, with some cases holding that there is no duty to make books and records available to a relator-stockholder who seeks them for an improper motive⁵³ and with other cases suggesting that an inquiry into the stockholder's motive is immaterial to enforcement of the corporation's duty⁵⁴ or that every doubt should be resolved in favor of the stockholder.⁵⁵ Another area in which Missouri courts have allowed mandamus against corporations is to require performance of the corporate duty to hold fair elections by compelling certification of appropriate election results and making consequent entries in the minute book.⁵⁶ An old line of cases advanced the doctrine that mandamus would issue to compel a corporation to perform a duty to the public imposed by statute, ordi-

policy basis for the judicial aversion against mandamus to control voluntary associations was articulated by one court as a desire to leave voluntary associations to make their own rules in a free society and to avoid immersing courts in controversies akin to whether a heretic was properly excommunicated from a religious order. *State ex rel. Poulson v. Independent Order of Oddfellows*, 8 Mo. App. 148, 154 (1879).

52. *State ex rel. Koman v. Town & Campus of Alabama, Inc.*, 438 S.W.2d 292 (Mo. App. 1969) (affirming trial court's issuance of mandamus to make corporate records available); *State ex rel. Watkins v. Cassell*, 294 S.W.2d 647 (Mo. App. 1956); *State ex rel. Holmes v. Doe Run Lead Co.*, 178 S.W. 298 (Mo. App. 1915); *State ex rel. Watkins v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S.W. 1112 (1908); *State ex rel. Johnson v. St. Louis Transit Co.*, 124 Mo. App. 111, 100 S.W. 1126 (1907); *State ex rel. Wilson v. St. Louis & San Francisco Ry. Co.*, 29 Mo. App. 301 (1888). See also Mo. REV. STAT. § 351.215(2) (1969) which provides for a fine of \$250 against any corporate official who refuses a shareholder demand to inspect the company books. In *State ex rel. Aimonette v. C. & R. Heating and Serv. Co.*, 475 S.W.2d 409 (Mo. App. 1971), relator was allowed to recover the fine under § 351.215(2) in a mandamus proceeding. The case also held the relator's attorney to be a proper party to inspect corporate books. Another significant case concerning mandamus against corporations is *State ex rel. Jones v. Ralston Purina Co.*, 343 S.W.2d 772 (Mo. 1962), discussed in notes 173-82 *infra* and accompanying text.

53. *State ex rel. Manlin v. Druggists' Addressing Co.*, 113 S.W.2d 1061 (Mo. App. 1938); *State ex rel. Haeussler v. German Mut. Life Ins. Co.*, 169 Mo. App. 354, 152 S.W. 618 (1912).

54. *State ex rel. Holmes v. Doe Run Lead Co.*, 178 S.W. 298 (Mo. App. 1915); *State ex rel. Wilson v. St. Louis & San Francisco Ry. Co.*, 29 Mo. App. 301 (1888); *State ex rel. Spinney v. Sportsman's Park & Club Ass'n*, 29 Mo. App. 326 (1888).

55. See *State ex rel. Watkins v. Cassell*, 294 S.W.2d 647 (Mo. App. 1956); *State ex rel. English v. Lazarus*, 127 Mo. App. 401, 105 S.W. 780 (1907).

56. *State ex rel. Dunbar v. Hohmann*, 248 S.W.2d 49 (Mo. App. 1952).

nance, regulation or charter provisions.⁵⁷ These cases involved heavily regulated industries, such as telephone companies or railroads, which owed a duty of service to the public. The public duty doctrine developed in these cases, however, has not been extended to other types of corporations.⁵⁸ Thus, the only theory on which Missouri courts have allowed mandamus against corporations has been to compel performance of certain limited and well-defined duties.⁵⁹

C. *No Mandamus to Control Discretionary Decisions of Judicial or Administrative Officers*

While Missouri courts have freely allowed mandamus against judicial or administrative officers to compel the performance of a ministerial duty, they have also strongly adhered to the rule that mandamus will *not* issue to control the discretion of public officials.⁶⁰ The ministerial/discretionary distinction has traditionally been used in Missouri mandamus cases involving public officials, but has not been used by Missouri courts in mandamus cases involving private corporations—mandamus being issued against corporate officers only in certain recognized situations.⁶¹

Missouri courts have traditionally made rigorous application of the rule that mandamus will not issue to dictate the discretionary decisions of judicial officers.⁶² The rationale behind this general rule argues that

57. *State ex rel. Public Serv. Comm'n v. Missouri Southern R. Co.*, 279 Mo. 455, 214 S.W. 381 (1919) (to direct the continued operation of a railroad spur line); *State ex rel. City of St. Louis v. Missouri Pac. Ry. Co.*, 262 Mo. 720, 174 S.W. 73 (1914) (to build viaduct for public street over rail tracks); *State ex rel. Morris v. Hannibal & St. Jos. R.R. Co.*, 86 Mo. 13 (1885) (to cease blocking public road); *City of St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69 (1879) (dictum) (to appoint arbitrator pursuant to charter); *State ex rel. Payne v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S.W. 684 (1902) (to provide telephone service). *But see State ex rel. Star Publishing Co. v. Associated Press*, 159 Mo. 410, 60 S.W. 91 (1901), which held that mandamus will not issue to compel the making of a contract.

58. *See* note 57 *supra*.

59. While Missouri courts will allow mandamus against corporations only on the theory that the corporation has a clear duty (discussed in text above), mandamus can be denied against corporations on the theory of the *absence* of a clear duty or the presence of another adequate remedy, *see* note 104 *infra*; or the doubtful nature of relator's right to the writ, *see* notes 114 and 118 *infra*.

60. *See, e.g., State ex rel. Betts v. Megown*, 89 Mo. 156, 1 S.W. 208 (1886); *State ex rel. Bismarck Grill v. Keirnan*, 238 Mo. App. 507, 181 S.W.2d 798 (1944).

61. *See* note 59 *supra*.

62. *State ex rel. Hudson v. Ginn*, 374 S.W.2d 34 (Mo. 1964); *State ex rel. Thompson v. Norton*, 269 Mo. 562, 191 S.W. 429 (1917); *State ex rel. Lancashire Ins. Co. v. Rombauer*, 140 Mo. 121, 40 S.W. 763 (1897). *But see Parker v. Moody*,

the issuance of mandamus to control judicial discretion

would be inimical to the orderly administration of justice, and would serve to lessen respect for the courts. Corrective actions brought against judicial officers involve the idea of transgression, and should not be resorted to for the sole purpose of obtaining a speedy hearing nor for the correction of mere errors.⁶³

The scope of this bar to the issuance of mandamus can be illustrated by a sampling of cases. Mandamus has been denied: to control the discretion of a trial judge in making procedural rules to govern a crowded docket;⁶⁴ to alter a trial court's decision limiting information-gathering to interrogatories rather than depositions due to the advanced age and ill-health of the person to be interviewed;⁶⁵ and to control a probate judge's discretion in refusing to appoint decedent's sister as administratrix ad litem where the sister had earlier waived her right to be administratrix.⁶⁶ Nor will mandamus lie to compel an inferior tribunal to issue a writ of mandamus, since that decision is a matter of the court's sound discretion.⁶⁷ Thus, the general rule denying mandamus in cases of judicial discretion retains vitality in the contemporary law of Missouri.⁶⁸

In reviewing administrative decisions Missouri courts have with equal vigor observed the rule that mandamus will not lie to control discretionary decisions.⁶⁹ An early case advanced the definition of a "discretionary" decision and its effect in an administrative context:

When the duty is such as necessarily requires the examination of evidence and the decision of questions of law and fact, such a duty is not ministerial and, not being ministerial, the decision of a public officer to whom the discharge of such duty has been confided cannot be re-

446 S.W.2d 596 (Mo. 1969), where the court found no insulated judicial discretion in a trial judge's delegation to counsel of discretion to select the site for a change of venue.

63. *State ex rel. South St. Joseph Town Co. v. Mosman*, 112 Mo. App. 540, 550, 87 S.W. 75, 77 (1905).

64. *State ex rel. Taylor v. Bell*, 228 Mo. App. 481, 69 S.W.2d 320 (1934).

65. *State ex rel. Nichols v. Killoren*, 285 S.W.2d 38 (Mo. App. 1956).

66. *State ex rel. Burke v. Ross*, 420 S.W.2d 365 (Mo. App. 1967).

67. *State ex rel. Tate v. Sevier*, 334 Mo. 771, 68 S.W.2d 50 (1934).

68. See notes 62-67 *supra*.

69. *State ex rel. Whitehead v. Wenom*, 326 Mo. 352, 325 S.W.2d 59 (1930); *State ex rel. Folk v. Talty*, 166 Mo. 529, 66 S.W. 361 (1902); *State ex rel. O'Connor v. City of St. Louis*, 158 Mo. 505, 59 S.W. 1101 (1900); *State ex rel. University Park Bldg. Corp. v. Henry*, 376 S.W.2d 614 (Mo. App. 1964). The general bar against issuing mandamus to correct a discretionary decision of an administrative agency was incorporated into the standards for issuance of mandamus under the Administrative Procedure Act, quoted at note 31 *supra*.

viewed or reversed in a mandamus proceeding.⁷⁰

The classic rationale for denying mandamus to alter administrative discretion is that mandamus should not be the means of substituting the judgment of the court for the judgment of the administrators making discretionary decisions, lest the courts become the scenes of *de novo* trials for every administrative decision.⁷¹ The general bar to mandamus in discretionary cases insulates a wide variety of administrative decisions from court intervention, such as the denial of the writ: to compel a city building commissioner to revoke a building permit for insufficient parking where the building commissioner retained discretion to make continuing ad hoc adjustments of building plans;⁷² to compel the state supervisor of liquor control to maintain certain records which were not required by statute and which the supervisor had discontinued;⁷³ or to require a school board to move a school bus route two miles closer to a citizen's home, since the sufficiency of transportation was confided to the discretion of the board.⁷⁴ Even though the relator has suffered grievous injury, mandamus may not issue to unseat a discretionary decision. Thus, in *State ex rel. Pickering v. City of Willow Springs*, mandamus was denied to compel a city to correct a stench created by inadequate drainage.⁷⁵ The bar against issuing mandamus to alter discretionary administrative decisions has remained operative.⁷⁶

D. *Mandamus to Compel Judicial or Administrative Officers to Exercise Discretion*

Though the general rule that mandamus will not lie to control judicial or administrative discretion is entrenched,⁷⁷ Missouri courts qualify the rule to allow mandamus to compel public officials to exercise their discretion.⁷⁸ With regard to judicial officers higher courts may require an

70. *State ex rel. Heller v. Thornhill*, 174 Mo. App. 469, 472, 160 S.W. 558, 559 (1913).

71. *Id.* at 475, 160 S.W. at 560.

72. *State ex rel. University Park Bldg. Corp. v. Henry*, 376 S.W.2d 614 (Mo. App. 1964).

73. *State ex rel. Kavanaugh v. Henderson*, 350 Mo. 968, 169 S.W.2d 389 (1943).

74. *State ex rel. Rice v. Tomkins*, 329 Mo. App. 113, 203 S.W.2d 881 (1947).

75. 208 Mo. App. 1, 230 S.W. 352 (1921).

76. *See* note 69 *supra*.

77. *See* notes 60, 62, and 69 *supra*.

78. *See, e.g., Parker v. Moody*, 446 S.W.2d 596 (Mo. 1969); *State ex rel. Great American Ins. Co. v. Jones*, 396 S.W.2d 601 (Mo. 1965); *State ex rel. Pedrolie v. Kirby*, 349 Mo. 1010, 163 S.W.2d 964 (1942); *State ex rel. Case v. Seehorn*, 283 Mo. 508,

inferior tribunal to make a decision without directing the particular nature of the decision.⁷⁹ Thus, a circuit judge who dismissed a condemnation hearing after a preliminary determination that the action was improper was ordered by means of a writ of mandamus to exercise jurisdiction to make a final determination of the case.⁸⁰ When a trial court erroneously dismissed a case without deciding on the merits, mandamus was issued to compel a hearing of the cause.⁸¹

Similarly, mandamus is available to order administrative officers to exercise their discretion without requiring a specific determination.⁸² Illustrative of the rule are cases in which mandamus issued to require an administrative board to gather facts and hold a hearing on the merits of relator's case⁸³ or in which municipal officials were compelled to exercise their discretion as to arrests or warnings in enforcing a Sunday ban on liquor.⁸⁴

E. *Mandamus to Correct an Abuse of Discretion by Judicial or Administrative Officers*

The general rule that mandamus will not lie to control discretionary decisions of public officials is further qualified by the doctrine that the writ *will* issue to correct decisions of public officers which manifest an arbitrary, capricious or bad faith abuse of discretion.⁸⁵ In the circumstances of an abuse of discretion the courts will take the exceptional step of issuing mandamus to dictate that an appropriate decision be made.⁸⁶

Missouri courts have defined arbitrary decision-making as involving the absence of a rational justification for a decision⁸⁷ and have required

223 S.W. 664 (1920); *State ex rel. City of Stanberry v. Smith*, 172 Mo. 618, 73 S.W. 134 (1903).

79. *State ex rel. Fielder v. Kirkwood*, 345 Mo. 1089, 1093, 138 S.W.2d 1009, 1011 (1940).

80. *State ex rel. State Highway Comm'n v. Curtis*, 359 Mo. 402, 222 S.W.2d 64 (1949).

81. *State ex rel. Monett Mill Co. v. Neville*, 157 Mo. 386, 57 S.W. 1012 (1900).

82. *State ex rel. Pedrolie v. Kirby*, 349 Mo. 1010, 163 S.W.2d 964 (1942).

83. *State ex rel. Potts v. Travis*, 241 S.W.2d 282 (Mo. App. 1951).

84. *State ex rel. Wear v. Francis*, 95 Mo. 44, 8 S.W. 1 (1888).

85. *See, e.g., State ex rel. Kelleher v. St. Louis Pub. Schools*, 134 Mo. 296, 35 S.W. 617 (1896); *State ex rel. Corcoran v. Buder*, 428 S.W.2d 935 (Mo. App. 1968); *State ex rel. Reis v. Nangle*, 349 S.W.2d 508 (Mo. App. 1961); *State ex rel. Hultz v. Bowman*, 294 S.W. 107 (Mo. App. 1927).

86. *See* note 85 *supra*.

87. *State ex rel. Doniphan State Bank v. Harris*, 176 S.W. 9, 10 (Mo. 1915).

that discretion be reasonably exercised.⁸⁸ Arbitrary decision-making by lower courts is the most frequent instance in which mandamus is sought to correct judicial abuses of discretion. For example, where a trial court set aside a judgment without providing any reason, mandamus issued to correct the manifest injustice.⁸⁹ Likewise, when a trial judge held that a statute allowing an information to be filed within three years of the offense required that the information be filed within six months, his arbitrary decision was reversed by mandamus.⁹⁰

While an irrational exercise of judicial discretion may be corrected by mandamus, the traditional limit on the "abuse of discretion" justification for issuance of the writ has been that an erroneous but rational discretionary decision by a lower court is not subject to correction by mandamus.⁹¹ As one court observed: "It cannot be tolerated that a party may invoke the extraordinary writ of mandamus every time a judge makes an error in his opinion. It was never designed that this writ should usurp the function of a writ of error or appeal."⁹²

In reviewing administrative decisions the general rule that mandamus will not issue to correct a discretionary administrative decision⁹³ is qualified by allowing mandamus to correct an arbitrary, capricious, or bad faith administrative decision.⁹⁴ Arbitrary abuses of discretion have

88. *State ex rel. McCleary v. Adcock*, 206 Mo. 550, 556, 105 S.W. 270, 271 (1907).

89. *State ex rel. Diners' Financial Corp. v. Swink*, 434 S.W.2d 593 (Mo. App. 1968).

90. *State ex rel. Corcoran v. Buder*, 428 S.W.2d 935 (Mo. App. 1968).

91. *State ex rel. Springfield Traction Co. v. Broadus*, 207 Mo. 107, 105 S.W. 629 (1907); *State ex rel. Hyatt v. Smith*, 105 Mo. 6, 16 S.W. 1052 (1891).

92. *State ex rel. Kansas City v. Field*, 107 Mo. 445, 450, 17 S.W. 896, 897 (1891). *But see State ex rel. Shaul v. Jones*, 335 S.W.2d 468 (Mo. App. 1960), where the court issued mandamus to correct a mere error of the trial court without distinguishing or clarifying the impact on traditional mandamus doctrine on the subject.

93. The classic aversion of Missouri courts to impinging upon administrative discretion is illustrated by *State ex rel. Gehrig v. Medley*, 28 S.W.2d 1040, 1043 (Mo. App. 1930), where the court observed:

There is nothing in the admitted facts of this record tending to prove fraud, collusion, or bad faith on the part of the board. No such claim is made. The reasons set forth for failing to agree are plausible enough. Under such circumstances there is no sufficient reason for calling upon the strong arm of the law, and the courts should not tell the board of education of the district that they must erect a building within a particular time and, in effect, upon a particular site. To do so clearly invades the discretionary powers of the board.

94. *See State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35 (Mo. 1969); *State ex rel. Kelleher v. Board of St. Louis Pub. Schools*, 134 Mo. 296, 35 S.W. 617 (1896); *State ex rel. Allman v. Deatherage*, 120 S.W.2d 193 (Mo. App. 1938).

been frequent targets for correction by mandamus.⁹⁵ For example, mandamus was issued to correct the irrational act of a city director of personnel who on his own initiative decided not to hire firemen, unless they had more than twenty natural teeth.⁹⁶ Some cases have even suggested that the failure of an administrative agency to conduct an adequate investigation of relator's claim will constitute an arbitrary abuse of discretion.⁹⁷

Administrative decisions tainted with bad faith have also provoked frequent use of mandamus in Missouri. Illustrative of such cases is a situation in which mandamus issued to prevent one city from deliberately backing up the sewers of another city in order to compel increased contributions for joint sewer maintenance.⁹⁸ A significant case demonstrating the broad scope of the "abuse of discretion" principle is *State ex rel. Kelleher v. St. Louis Public Schools*, where mandamus was issued to prevent a "gross fraud" on the public when the St. Louis School Board, empowered to make all rules governing the manner of electing school board members, chose only Republican judges to conduct an election in an emotion-charged, partisan atmosphere.⁹⁹ After vigorous citizen protests and a Democratic proposal to place challengers at the polls were rejected by the board, the court issued mandamus at the request of a relator to correct the "manifest injustice" of the board's abuse of discretion.¹⁰⁰ In preventing administrative bad faith, Missouri has narrowed its standards in only one area, by denying mandamus to an unsuccessful bidder for a public contract who seeks the writ as a private person to compel award of the contract to himself.¹⁰¹

95. See, e.g., *State ex rel. Shartel v. Humphreys*, 338 Mo. 1091, 93 S.W.2d 924 (1936); *State ex rel. Allman v. Deatherage*, 120 S.W.2d 193 (Mo. App. 1938); *State ex rel. Hultz v. Bowman*, 294 S.W. 107 (Mo. App. 1927).

96. *Kahon v. Scarce*, 228 S.W.2d 384 (Mo. App. 1950). The evidence also showed that a number of incumbent firemen had nothing but false teeth. *Id.* at 388.

97. See *State ex rel. Kugler v. Tillatson*, 331 Mo. 1006, 312 S.W.2d 753 (1958). But see *State ex rel. Kopper Kettle Restaurants, Inc. v. City of St. Robert*, 424 S.W.2d 73 (Mo. App. 1968), where mandamus was denied although there was no clear showing of an investigation by the agency of the facts behind relator's claim. However, the court did remand for trial of facts. *Id.* at 80.

98. *State ex rel. Shartel v. Humphreys*, 373 Mo. 1091, 93 S.W.2d 924 (1936).

99. *State ex rel. Kelleher v. Board of St. Louis Pub. Schools*, 134 Mo. 296, 35 S.W. 617 (1896).

100. *Id.* at 298, 35 S.W. at 618.

101. *State ex rel. Johnson v. Sevier*, 339 Mo. 483, 98 S.W.2d 677 (1936), which overruled two prior decisions, *State ex rel. Journal Printing Co. v. Dreyer*, 183 Mo. App. 463, 167 S.W. 1123 (1914) and *State ex rel. First Nat'l Bank v. Bourne*, 151 Mo. App. 104, 131 S.W. 896 (1910).

The standard that courts will not disturb plausible, albeit erroneous, administrative decisions made in good faith has prevented the "abuse of discretion" doctrine from developing into a general justification for review of administrative decisions through the extraordinary writ of mandamus.¹⁰² As the St. Louis Court of Appeals observed in 1964: "Finally it should be pointed out that relator admits that the respondents acted in good faith. It would seem that such an admission would preclude the charge of an abuse of discretion."¹⁰³

F. *No Mandamus Against Judicial, Administrative or Corporate Officers Where Relator Has Another Adequate Remedy*

Even though the relator has established a case for the issuance of the writ of mandamus against an administrative, judicial or corporate official, he may be denied the writ if he has another adequate remedy.¹⁰⁴ The usual "other adequate remedy" is appeal through the courts,¹⁰⁵ al-

102. *State ex rel. Richardson v. Baldry*, 331 Mo. 1006, 56 S.W.2d 67 (1932); *State ex rel. Gehner v. Thompson*, 316 Mo. 835, 293 S.W. 391 (1927); *State ex rel. Hagerman v. Drabelle*, 191 S.W. 691 (Mo. 1916). *But see State ex rel. Wolfe v. Missouri Dental Bd.*, 282 Mo. 292, 231 S.W. 70 (1920), where the court held that mandamus would issue to correct the denial of a dentist license based on an erroneous construction of law by the Board. The court did not specify what theory militated issuance of mandamus. However, the element of arbitrariness may have been present, though unarticulated by the court, since the Board had denied relator a transcript and had led relator to believe there would be no adverse action pending relator's appeal.

103. *State ex rel. Rainey v. Crowe*, 382 S.W.2d 38, 44 (Mo. App. 1964). It might be noted, however, that any "good faith" decision must retain an element of rational plausibility, or the decision will be susceptible to attack by mandamus as an arbitrary and capricious abuse of discretion. See notes 91-97 *supra* and accompanying text.

104. See, e.g., *State ex rel. University Bank v. Blair*, 365 Mo. 699, 285 S.W.2d 678 (1956); *State ex rel. Lamport v. Robinson*, 257 Mo. 584, 165 S.W. 997 (1914); *State ex rel. Kansas City v. Kansas City Gas Co.*, 254 Mo. 515, 163 S.W. 854 (1913); *Sheridan v. Fleming*, 2 S.W. 838 (Mo. 1887); *State ex rel. Mary Frances Realty Co. v. Homer*, 150 Mo. App. 325, 130 S.W. 510 (1910). Illustrative of the possible harshness of the rule is *State ex rel. Horton v. Bourke*, 334 Mo. 826, 129 S.W.2d 866 (1939), where relator's license was revoked due to a bad-faith conspiracy of an administrative board, yet mandamus was denied because of the other remedy of appeal.

105. There are several avenues of appeal of an administrative decision in Missouri. In a "contested case" the Missouri Administrative Procedure Act provides for appeal through the courts without resort to the extraordinary writs where a final administrative decision has been rendered. MO. REV. STAT. § 536.100 (1969). A "contested case" is a "proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." MO. REV. STAT. § 536.010 (1969). For a discussion of the construction given by Missouri courts to the "contested case" requirement, see 36 MO. L. REV. 444 (1971). In cases other than the "contested cases" covered under § 536.100, Missouri allows resort to the extraordinary writs. MO. REV. STAT. § 536.150 (1969). Missouri also provides for an intermediate

though Missouri courts have occasionally considered appeals to the legislature,¹⁰⁶ suits at law,¹⁰⁷ and exhaustion of appeal procedures within an incorporated association¹⁰⁸ or in an election contest¹⁰⁹ as other "adequate remedies". The reason for the "other adequate remedy" bar is to reserve the extraordinary writ of mandamus for matters of great urgency or public importance and thus to avoid the disruption of ordinary appeal procedures occasioned by pushing cases ahead on the docket and forcing appellate courts to weigh facts more appropriately heard in trial courts.¹¹⁰

But two exceptions have been established to avoid the denial of mandamus on grounds of the adequacy of another remedy. The first exception involves the issuance of mandamus, regardless of the right of a party to appeal, when a trial court has failed to enter a judgment as directed by an appellate court on remand.¹¹¹ The reason for this exception is the desire of appellate courts to avoid a futile round of appeals by compelling the compliance of a recalcitrant trial court with the judgment originally directed.¹¹² The second exception lifts the "other adequate remedy" bar only in the special circumstance when the other

layer of review in the case of certain administrative agencies empowered to license, Mo. REV. STAT. § 161.272 (1969), with a hearing of appeals before the Administrative Hearing Commission. The decision of the Administrative Hearing Commission is in turn subject to judicial review under the provisions of the Administrative Procedure Act of chapter 536. Mo. REV. STAT. § 161.332 (1969). In addition to these routes of appealing administrative decisions one statute, the Liquor Control Law, has its own specific provisions for appeal and judicial review without resort to the extraordinary writs. Mo. REV. STAT. § 311.700 (1969).

With regard to obtaining review of adverse *judicial* decisions, Missouri courts strongly incline toward insistence on use of the ordinary channels of judicial appeal rather than resort to mandamus. *See State ex rel. Howe v. Hughes*, 343 Mo. 827, 123 S.W.2d 105 (1938) (mere fact that appeal is a slower process does not justify resort to mandamus); *Spring River Elec. Power Co. v. Thurman*, 232 Mo. 130, 132 S.W. 1157 (1910); *State ex rel. Herriford v. McKee*, 150 Mo. 233, 51 S.W. 421 (1899); *State ex rel. Betts v. McGowan*, 89 Mo. 156, 1 S.W. 208 (1886). *But see State ex rel. State Highway Comm'n v. Curtis*, 359 Mo. 402, 406, 222 S.W.2d 64, 67 (1949), where the court allowed mandamus, noting that appeal was an inadequate remedy without further explanation.

106. *See State ex rel. Gehner v. Thompson*, 316 Mo. 1169, 293 S.W. 391 (1927).

107. *State ex rel. Bornfield v. Rombauer*, 46 Mo. 155 (1870).

108. *State ex rel. Cammann v. Tower Grove Turn Verein*, 206 S.W. 242 (Mo. App. 1918). However, *State ex rel. Schrimpp v. Ancient Order United Workmen*, 70 Mo. App. 456 (1897), suggests, in dictum, a different conclusion.

109. *See State ex rel. Nichols v. Schmontey*, 418 S.W.2d 385 (Mo. App. 1967).

110. *State ex rel. Dietz v. Carter*, 319 S.W.2d 56 (Mo. App. 1958).

111. *State ex rel. Stites v. Goodman*, 351 S.W.2d 763 (Mo. 1961).

112. *State ex rel. Robertson v. Kelly*, 293 Mo. 297, 239 S.W. 867 (1922).

remedy is not equally "effective"—that is, when the other remedy cannot accomplish precisely the same results as mandamus.¹¹³

G. *No Mandamus Against Judicial, Administrative or Corporate Officials if Relator's Right to the Writ is Doubtful*

Missouri courts raise an absolute bar against issuance of mandamus against judicial, administrative or corporate officials when the relator's right to the writ is doubtful.¹¹⁴ This standard seems to contemplate that the respondent's duty must be clearly established in existing law for mandamus to issue, as evidenced by recurrent maxims like: "mandamus will issue to enforce, not to establish, a claim or right" or "the office of the writ of mandamus is to execute, not to adjudicate."¹¹⁵ A typical use of the "doubtful case" bar to mandamus is *State ex rel. Powell v. City of Creve Coeur*, where the court refused to issue mandamus to compel a city to furnish an itemized statement of the sum necessary to redeem relator's property from taxes since there was no statutory duty on the city to furnish such records and the relator's right to the writ was consequently doubtful.¹¹⁶ Thus, the "doubtful case" bar to man-

113. *State ex rel. Wells v. Mayfield*, 365 Mo. 328, 281 S.W.2d 9 (1955) (mandamus allowed since appeal not allowable to correct improper interlocutory decree); *State ex rel. Yale Univ. v. Sartorius*, 349 Mo. 1039, 163 S.W.2d 981 (1942) (mandamus allowed to order circuit judge to allow relator an appeal); *State ex rel. Watkins v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S.W. 1112 (1908) (equity proceeding not equally effective since inspection of corporate books under equity is only pursuant to receivership hearing while mandamus allows more general inquiry into corporate records). *But cf. State ex rel. Herriford v. McKee*, 150 Mo. 233, 51 S.W. 421 (1899) (relator cannot escape bar of the "other adequate remedy" doctrine if he has lost an equally effective remedy by his own negligence); *State ex rel. Scott v. Searce*, 303 S.W.2d 175 (Mo. App. 1957). *See also State ex rel. Howe v. Hughes*, 343 Mo. 827, 123 S.W.2d 105 (1938) (mere fact that appeal is a slower process does not justify resort to mandamus).

114. *See, e.g., State ex rel. Breshears v. Missouri State Employees Retirement Sys.*, 362 S.W.2d 571 (Mo. 1962); *State ex rel. Crow v. Boonville R.R. Bridge Co.*, 206 Mo. 74, 103 S.W. 1052 (1907); *State ex rel. Pope v. Lisle*, 469 S.W.2d 841 (Mo. App. 1971); *State ex rel. Burke v. Ross*, 420 S.W.2d 365 (Mo. App. 1967); *State ex rel. McGuire v. Hermann*, 403 S.W.2d 1 (Mo. App. 1966); *State ex rel. Coffman v. Crain*, 308 S.W.2d 451 (Mo. App. 1958); *State ex rel. Hanlon v. City of Maplewood*, 231 Mo. App. 739, 99 S.W.2d 138 (1936).

115. *See State ex rel. Phillip v. Public School Retirement Sys.*, 364 Mo. 395, 262 S.W.2d 569 (1953); *Yefremenko v. Lauf*, 450 S.W.2d 462 (Mo. App. 1970); *State ex rel. Walton v. Miller*, 297 S.W.2d 611 (Mo. App. 1956). *But see State ex rel. Magidson v. Henze*, 342 S.W.2d 261 (Mo. App. 1961), where the court held mandamus could be used to adjudicate the constitutionality of a statute.

116. 452 S.W.2d 258 (Mo. App. 1970).

damus poses a severe obstacle to the use of the writ in resolving difficult legal questions.¹¹⁷ The "doubtful case" standard has been used often to thwart novel or innovative uses of the writ, especially against officials of corporations or voluntary associations.¹¹⁸ An occasional case has even carried the "doubtful case" standard so far as to bar mandamus where there is doubt about the factual basis of the relator's claim.¹¹⁹ However, one case, *State ex rel. Christian v. Lawry*,¹²⁰ explicitly rejects rigorous application of the "doubtful case" standard to matters of disputed fact in a mandamus action, arguing that relator's right to relief need not be established "to the point of mathematical certainty."

IV. PRESENT STATUS AND FUTURE APPLICABILITY

A. *Change and Continuity—An Overview*

The decade of the sixties witnessed three Missouri Supreme Court decisions which seemed to challenge many of the traditional mandamus doctrines previously outlined in this note. Two of the supreme court opinions seemed to lessen former restrictions on issuance of mandamus against judicial and administrative officers. Interestingly, a third opinion, regarding mandamus against corporate officers, involved a tightening of standards. These cases and their possible consequences are explored in the following narrative.

B. *New Doctrine on Judicial Discretion*

In 1966 the Missouri Supreme Court decided a case which seems difficult to reconcile with some traditional mandamus doctrines. The case, *State ex rel. Knight Oil Co. v. Vardeman*, arose out of a suit by Knight Oil Company as plaintiff for conversion of a check.¹²¹ The defendant moved to require joinder of another party plaintiff, alleging that Knight Oil Company had engaged in a joint adventure to share

117. Courts may be driven to strain construction of existing law to avoid problems with the "doubtful case" bar. See note 47 *supra*. For a critical discussion of the tendency of traditional mandamus doctrines to prevent courts from properly attacking difficult legal problems, see note 202 *infra*.

118. See *State ex rel. Cook v. Kelly*, 142 S.W.2d 1091 (Mo. App. 1940); *State ex rel. Onion v. Supreme Temple Pythian Sisters*, 227 Mo. App. 557, 54 S.W.2d 468 (1932); *State ex rel. Lyons v. Bank of Conception*, 174 Mo. App. 589, 163 S.W. 945 (1913).

119. See *Yefremenko v. Lauf*, 450 S.W.2d 462 (Mo. App. 1970); *State ex rel. McGuire v. Hermann*, 403 S.W.2d 1 (Mo. App. 1966).

120. 405 S.W.2d 729 (Mo. App. 1966).

121. *State ex rel. Knight Oil Co. v. Vardeman*, 409 S.W.2d 672, 673 (Mo. 1966).

equally any sum recovered by Knight Oil Company in its suit.¹²² The trial court ordered Knight Oil Company to be joined with the alleged co-adventurer as joint plaintiffs.¹²³ Knight Oil Company then sought mandamus against the trial court to deny the joinder.¹²⁴ The Missouri Supreme Court issued mandamus, holding that the trial court had unlawfully exceeded its jurisdiction by abusing its discretion in ordering joinder when, as a matter of law, there was no joint adventure between Knight Oil Company and the party joined.¹²⁵ The supreme court stated that it did “not construe the agreement as creating a joint adventure” noting that “the mere participation in the contingent proceeds of a suit is not, in our view [a joint venture].”¹²⁶ Therefore, since no joint adventure existed, the supreme court stated that the additional party was not necessary as a matter of law, and the trial court had no discretion to do otherwise than deny joinder.¹²⁷

The case might well have been decided differently under traditional mandamus doctrines. First of all, necessary joinder in a case of first impression might have been held a discretionary decision of the trial court with any error being correctable on appeal without resort to mandamus.¹²⁸ Second, any “abuse of discretion” or “excess of jurisdiction” argument would have to grapple with the trial court’s contention that it made a plausible and reasonable construction of the agreement between the parties as a joint adventure.¹²⁹ The supreme court was perhaps sensitive to this point since it twice referred to the agreement “as we construe it” and a third time spoke of the agreement as not being a joint adventure “in our view.”¹³⁰ If the discretion of the trial court were rationally based and in good faith, it would ordinarily be immune to a charge of abuse of discretion in a mandamus proceeding, even if the trial court had erred in its opinion.¹³¹ Third, the writ of mandamus would not ordinarily issue where the right to the writ was doubtful, *i.e.* the function of the writ is to execute, not to adjudicate.¹³² The

122. *Id.* at 674.

123. *Id.*

124. *Id.*

125. *Id.* at 678.

126. *Id.* at 676.

127. *Id.* at 678.

128. See notes 62-67 *supra*.

129. See notes 91-92 *supra*.

130. 409 S.W.2d at 676.

131. See notes 91-92 *supra*.

132. See note 115 *supra*.

Knight Oil court admitted, however, that there was no Missouri precedent for utilizing mandamus to deny joinder.¹³³ The court had granted relator leave to amend since relator had originally brought this action as a writ of prohibition.¹³⁴ When relator failed to argue that an abuse of discretion occurred, the court on its own motion advanced the argument.¹³⁵ The five-and-a-half page opinion devotes one page to a statement of the facts and four pages to its construction of the agreement as not constituting a joint adventure.¹³⁶ The court cites only two writ of prohibition cases in support of its contention that mandamus would lie in the circumstances of this case.¹³⁷ In sum, it might be suggested that the court did a substantial amount of adjudicating to issue mandamus in this case, and that the relator's right to the writ was something less than the "clear, unequivocal" one usually required to avoid the bar of the "doubtful case" standard.¹³⁸ Finally, the "adequacy of other remedies" bar might have blocked mandamus in the *Knight Oil* case. It might have been argued the relator would have had a remedy on appeal to correct any mistake of the trial court without resorting to the extraordinary writ of mandamus.¹³⁹ None of these traditional mandamus standards were discussed or distinguished by the *Knight Oil* court.¹⁴⁰

C. *New Doctrine on Administrative Discretion*

Knight Oil might have remained an aberration but for its potential for the future. The case was only cited for its holdings regarding joint adventures until it was picked up and used again by the supreme court

133. 409 S.W.2d at 675.

134. *Id.* at 673.

135. *Id.* at 675.

136. *Id.* at 673-78.

137. *State ex rel. McCarter v. Craig*, 328 S.W.2d 589 (Mo. 1959); *State ex rel. Siegel v. Strother*, 365 Mo. 861, 289 S.W.2d 73 (1956). Significantly, Missouri courts have been willing to issue prohibition on the basis of very expansive definitions of "abuse of discretion" and "excess of jurisdiction." See Note, *The Writ of Prohibition in Missouri*, 1972 WASH. U.L.Q. 511, 523-26.

138. See *State ex rel. Phillip v. Public School Retirement Sys.*, 364 Mo. 395, 402, 262 S.W.2d 569, 574 (1953): "A litigant asking relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed. He must show himself possessed of a clear and legal right to a remedy. [Citations omitted.] The burden, therefore, rests upon relators."

139. See notes 104 and 105 *supra*.

140. *State ex rel. Knight Oil Co. v. Vardeman*, 409 S.W.2d 672, 673-78 (Mo. 1966).

as support for another mandamus case.¹⁴¹ That second case, *State ex rel. Keystone Laundry and Dry Cleaners, Inc. v. McDonnell*,¹⁴² represented a far clearer departure from traditional mandamus standards. In this case the city of Joplin, pursuant to state constitutional and statutory provisions, had approved a bond issue to fund the purchase and development of a site to be leased to a commercial laundry.¹⁴³ Missouri statutes required that before any such plan for economic development could be implemented, a division of the state Industrial Development Commission would have to extend its approval.¹⁴⁴ This agency was empowered to promote establishment of "industrial plant[s]."¹⁴⁵ The Commission approved the proposal, believing that the laundry would constitute an "industrial plant" within the terms of the statute¹⁴⁶ and verifying its belief by obtaining an advisory opinion from the state attorney general.¹⁴⁷ The relators, laundry operators in the Joplin area, sought mandamus to rescind the project, arguing that a commercial laundry was a service business, not an industrial plant within the meaning of the authorizing statute.¹⁴⁸ The supreme court issued mandamus to reverse the decision of the Industrial Development Commission on the ground that the Commission had abused its discretion by errone-

141. The cases citing *Knight Oil* used it as a means of expanding Missouri doctrines on joint adventures.

142. 426 S.W.2d 11 (Mo. 1968).

143. *Id.* at 13. The relevant constitutional provision is Mo. CONST. art. 6, § 27:

Any city or incorporated town or village in this state, by vote of four-sevenths of the qualified electors thereof voting thereon, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any of the following: . . . (2) plants to be leased or otherwise disposed of pursuant to law to private persons or corporations for manufacturing and industrial development purposes, including the real estate, building, fixtures and machinery. . . .

The relevant statutes are MO. REV. STAT. §§ 100.010 to 100.200 (1969). The key term "project for industrial development" is defined in § 100.010 as:

(5) "Project for industrial development" or "project", the purchase, construction, extension and improvement of industrial plants, including the real estate either within or without the limits of such municipalities, buildings, fixtures, and machinery. . . .

144. MO. REV. STAT. §§ 100.010 to 100.200 (1969).

145. *Id.*

146. MO. REV. STAT. § 100.010 (1969).

147. *State ex rel. Keystone Laundry and Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 13 (Mo. 1968). The opinion is Opinion of the Attorney General of Missouri 179, March 29, 1966.

148. *State ex rel. Keystone Laundry and Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 13 (Mo. 1968).

ously deciding "as a matter of law" that a laundry was an industrial plant.¹⁴⁹

The significance of the court's departure from traditional mandamus doctrines and standards can be demonstrated by a comparison of the court's opinion with traditional attitudes. Under the normal rule mandamus will not issue to correct a plausible, good-faith exercise of discretion by an administrative official.¹⁵⁰ This principle was reaffirmed as recently as 1964 by the St. Louis Court of Appeals when it held that a good faith exercise of discretion is immune to a charge of abuse of discretion.¹⁵¹ In the facts of the *Keystone Laundry* case the administrative officials made a reasoned and good-faith interpretation of the phrase "industrial plant."¹⁵² There was no Missouri case law on the subject.¹⁵³ The Commission took the exceptional step of seeking an advisory opinion from the state attorney general.¹⁵⁴ This pattern of behavior would seem to constitute good-faith, reasonable exercise of discretion which would ordinarily bar mandamus.¹⁵⁵ Yet the Missouri Supreme Court issued mandamus, arguing that "the good faith and solemn belief of the officer should not be concerned where there has been an abuse of discretion accomplished by disobedience of the law."¹⁵⁶ While the court did not explicitly overrule the good-faith limitation on issuance of mandamus, one commentator has suggested that *Keystone Laundry* has by implication laid the good-faith doctrine to rest.¹⁵⁷

Another traditional mandamus doctrine which seems incongruous with the *Keystone Laundry* opinion is the "doubtful case" bar to mandamus. The ordinary standard is that mandamus lies to enforce, not to establish a right—to execute, not to adjudicate.¹⁵⁸ The writ does not issue in doubtful cases.¹⁵⁹ Yet in *Keystone Laundry* the relator's

149. *Id.* at 19, citing *State ex rel. Knight Oil Co. v. Vardeman*, 409 S.W.2d 672, 675 (Mo. 1966), for support.

150. See note 102 *supra*.

151. *State ex rel. Rainey v. Crowe*, 382 S.W.2d 38, 44 (Mo. App. 1964).

152. *State ex rel. Keystone Laundry and Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 15 (Mo. 1968).

153. *Id.* at 16.

154. *Id.* at 17.

155. See note 102 *supra*.

156. *State ex rel. Keystone Laundry and Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 15 (Mo. 1968).

157. 34 Mo. L. REV. 408, 413 (1969).

158. See note 115 *supra*.

159. See note 114 *supra*.

right to the writ depended upon their contention that a laundry was not an "industrial plant"—a question of first impression in Missouri courts.¹⁶⁰ The supreme court noted that the only cases on whether a laundry was an "industrial plant" were some Pennsylvania cases which reached diverse results.¹⁶¹ The court also recognized that there was some difficulty in making a determination of what constitutes an industrial plant:

We shall not attempt to define an "industrial plant" in a form which would be applicable to all cases and situations. That would be most difficult, probably misleading as applied to other facts, and perhaps impossible. . . .

. . . .

There may be a somewhat "gray" line of demarcation between the boundaries of "plants for industrial development" and of those businesses which are rightfully excluded.¹⁶²

Yet the court issued mandamus in *Keystone Laundry* without discussing the "doubtful case" standard.

The *Keystone Laundry* opinion may also clash with the traditional standards of the "other adequate remedy" bar to mandamus. The ordinary rule is that mandamus will not lie where the relator has another adequate remedy.¹⁶³ In the *Keystone Laundry* case it could be argued that the relator had an ordinary statutory remedy of appeal through the courts, which would bar resort to the extraordinary writ.¹⁶⁴ But the supreme court sought to deal with this contention by noting that the "other remedy" doctrine has been modified to require that the other remedy be equally efficient.¹⁶⁵ The court seemed to allude to a need for the greater speed of mandamus over appeal when it stated, "[T]he discretion of the court with regard to the issuance of the writ is sometimes influenced by the 'public importance' of the matter."¹⁶⁶ The court seemed to be arguing that appeal was too slow a process if the question were of extreme public importance. Thus, *Keystone Laundry*

160. *State ex rel. Keystone Laundry and Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 15 (Mo. 1968).

161. *Id.*

162. *Id.* at 18.

163. See note 104 *supra*.

164. See note 105 *supra*.

165. *State ex rel. Keystone Laundry and Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 15 (Mo. 1968).

166. *Id.*

does not necessarily clash with the "adequate remedy" doctrine.¹⁶⁷

The *Keystone Laundry* opinion may also represent a departure from the traditional restraint of courts in avoiding substitution of their discretion for the discretion of administrative officials. The general rule remains that mandamus will not lie to alter a discretionary decision for the policy reason that courts should not short-circuit the process of administrative decision-making.¹⁶⁸ The guiding principle has been that judges should not unseat administrative expertise and judgment in order to substitute their own views and policy preferences.¹⁶⁹ These perspectives do not mesh with the pronouncements of the supreme court in *Keystone Laundry*:

We must exercise our own judgment in arriving at what we think the people of Missouri intended, and it is our firm belief and our ruling that they did not intend thus to authorize city revenue bond projects for the construction and financing of commercial laundries which, in essence, are *service businesses* [S]uch a project would naturally compete with local business, and perhaps do so with distinct advantages in its favor.¹⁷⁰

Though the court uttered these words in the context of construing the constitutional provision authorizing the industrial development program,¹⁷¹ the court's attitude seems abrasive to traditionalist mandamus sensitivities against substituting the preferences of the court for the decision of an agency.¹⁷²

D. *Retrenchment Regarding Mandamus Against Corporate Officers*

In sharp contrast to the expansion of mandamus beyond traditional doctrines in *Knight Oil* and *Keystone Laundry*, a third Missouri Supreme Court case in the sixties featured an explicit narrowing of the scope of mandamus against corporate officers. The case, *State ex rel. Jones v. Ralston Purina Co.*,¹⁷³ was the only significant supreme court

167. See note 113 *supra*. But see *State ex rel. Howe v. Hughes*, 343 Mo. 827, 123 S.W.2d 105 (1938) (mere fact that appeal is a slower process does not justify resort to mandamus).

168. See notes 70 and 71 *supra* and accompanying text.

169. See text accompanying note 71 *supra*.

170. *State ex rel. Keystone Laundry and Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 17, 18 (Mo. 1968).

171. *Id.* at 18.

172. Observe the tone adopted by the legislature in its standards on issuance of mandamus in the Administrative Procedure Act, quoted at note 31 *supra*.

173. 358 S.W.2d 772 (Mo. 1962).

decision in the decade concerning availability of mandamus against corporate officers.¹⁷⁴

The relator in that case was a shareholder and former employee of the corporation seeking mandamus to enforce his statutory right to inspect corporate books and records.¹⁷⁵ The relator specifically demanded to see three tentative financial studies: the preliminary profit and loss statement, the monthly profit analysis, and the detailed tentative balance sheet.¹⁷⁶ The company argued strongly that these documents were confidential and that disclosure of the requested information would jeopardize the company's competitive position.¹⁷⁷ The trial court held that the requested documents were not "books" or "records of account" required by the statute to be available to shareholders.¹⁷⁸ The St. Louis Court of Appeals reversed, interpreting the Missouri statute as placing a duty on corporations to make all documents available which would enable stockholders to protect their interests and holding that mandamus would issue to enforce the corporate duty.¹⁷⁹ The Missouri Supreme Court reversed and denied mandamus, holding that the requested documents were confidential tools of management, not within

174. Very few corporate mandamus cases ever reached the appellate courts of Missouri in the 1960's, perhaps because the grounds for issuance of mandamus against a corporation were few and relatively well-settled. For a typical case, see *State ex rel. Koman v. Town & Campus of Alabama, Inc.*, 438 S.W.2d 292 (Mo. App. 1969).

175. *State ex rel. Jones v. Ralston Purina Co.*, 358 S.W.2d 772, 773 (Mo. 1962). The Missouri statute which establishes a corporate duty to make corporate books available to shareholders is MO. REV. STAT. § 351.215 (1969) which provides:

1. Each corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its shareholders and board of directors; and shall keep at its registered office or principal place of business in this state books in which shall be recorded the number of shares subscribed, the names of the owners of the shares, the numbers owned by them respectively, the amount of shares paid, and by whom, the transfer of said shares with the date of transfer, the amount of its assets and liabilities, and the names and places of residence of its officers, which books shall be kept open for the inspection of all persons interested. Each shareholder may at all proper times have access to the books of the company, to examine the same, and under such regulations as may be prescribed by the bylaws.

2. If any officer of a corporation having charge of the books of the corporation shall, upon the demand of a shareholder, refuse or neglect to exhibit and submit them to examination, he shall, for each offense, forfeit the sum of two hundred and fifty dollars.

176. *State ex rel. Jones v. Ralston Purina Co.*, 358 S.W.2d 772, 774 (Mo. 1962).

177. *Id.*

178. *Id.* at 776.

179. *State ex rel. Jones v. Ralston Purina Co.*, 343 S.W.2d 631, 640 (Mo. App. 1961).

contemplation of the statutory duty to make "books" available to stockholders.¹⁸⁰

The Missouri Supreme Court's decision brought to a close the tendency of the St. Louis Court of Appeals to broaden the categories of documents which a court could compel a corporation to make available to stockholders by writ of mandamus. Six years earlier the St. Louis Court of Appeals had held that the statute at issue in the *Ralston Purina* case should be broadly interpreted to extend the stockholder's right to demand inspection "to all books, records, papers, contracts or other instruments which will enable the stockholder better to protect his interest and perform his duties as a stockholder."¹⁸¹ In the *Ralston Purina* case the court of appeals was attempting to extend that interpretation to encompass tentative management working papers,¹⁸² but the Missouri Supreme Court slammed the door on this trend. Thus, while in *Keystone Laundry* the Missouri Supreme Court broadly interpreted a statute to extend the scope of mandamus against administrative officers beyond existing precedent, in *Ralston Purina* the same court narrowly interpreted a statute to restrict the scope of mandamus against corporate officers and to reverse existing precedent.

E. *The Effect of the Mandamus Trilogy*

The effect on Missouri law of the mandamus trilogy is clearest in *Ralston Purina*. In that case the supreme court explicitly constricted the scope of mandamus against corporations. The mood of the court seems to reflect the traditional reluctance of Missouri courts to allow mandamus against private corporations, associations and individuals.¹⁸³ As discussed earlier, Missouri courts have limited mandamus against corporations to enforce only certain well-defined duties and have sharply narrowed the scope of those duties.¹⁸⁴ The *Ralston Purina* case, therefore, represents a further limiting of the application of mandamus to corporations.

180. *State ex rel. Jones v. Ralston Purina Co.*, 358 S.W.2d 772, 773 (Mo. 1962). The court did not decide the question of the scope of the common law duty to make books available. *Id.* at 776.

181. *State ex rel. Watkins v. Cassell*, 294 S.W.2d 647, 652 (Mo. App. 1956).

182. *State ex rel. Jones v. Ralston Purina Co.*, 358 S.W.2d 772, 774 (Mo. 1962).

183. See notes 48, 49, 51, 53, 104, 108 and 116 *supra*.

184. See also *State ex rel. Hyde v. Jackson County Med. Soc'y*, 295 Mo. 144, 243 S.W. 341 (1922); *State ex rel. City of Carthage v. Cowgill & Hill Mill Co.*, 156 Mo. 620, 57 S.W. 1008 (1900); *State ex rel. Lawrence v. McGann*, 64 Mo. App. 225 (1895).

However, *Knight Oil* and *Keystone Laundry* present standards which are not clearly reconcilable with traditional mandamus doctrines. It seems reasonable to regard these two cases as anomalous. The key problem is the impact of the two cases on the principles which govern issuance of mandamus to alter judicial and administrative discretion. It might be that the effect of the two cases will be limited to their peculiar facts. Neither case has generated any further doctrinal breakthroughs. For example, cases in the 1970's continue to apply the "doubtful case" bar to mandamus with unabated vigor.¹⁸⁵ Likewise, the "good faith" doctrine may still survive, as evidenced by a St. Louis Court of Appeals decision in 1969 which denied mandamus to alter a discretionary decision even though a town council had made mistakes of both fact and law.¹⁸⁶ Yet the *Knight Oil* and *Keystone Laundry* cases were both decisions of the Supreme Court of Missouri. Both stand for the principle that a discretionary decision which involves a mistake of law, even on a case of first impression, can be altered by mandamus—a principle which does not harmonize with traditional doctrines.¹⁸⁷ Certainly these two opinions by the highest court of the state carry the potential for more expansive mutations of doctrine.

F. *Projections for the Future*

If the inclinations of the Missouri Supreme Court of the sixties regarding mandamus continue in the seventies, the least likely area for sweeping change would be mandamus against corporations. The *Ralston Purina* case manifested a mood of resistance to expansion of the writ. However, *Ralston Purina* was decided in 1962, several years before the doctrinal mutations which seem inherent in *Knight Oil* and *Keystone Laundry*. It is still possible that a change of perspective will occur with regard to the corporate duty to make records available. The *Ralston Purina* case merely limited the scope of mandamus against corporations based on the Missouri statutory right to inspect books, but the case did not decide the extent of the common law right of inspection.¹⁸⁸ In an era in which there has been increasing pressure on gov-

185. See *State ex rel. Purdy Reorganized School Dist. No. 11 v. Snider*, 470 S.W.2d 805 (Mo. App. 1971); *State ex rel. Pope v. Lisle*, 469 S.W.2d 841 (Mo. App. 1971); *State ex rel. Powell v. City of Creve Coeur*, 452 S.W.2d 258 (Mo. App. 1970); *Yefremko v. Lauf*, 450 S.W.2d 462 (Mo. App. 1970).

186. *State ex rel. Rock Road Frontage, Inc. v. Davis*, 444 S.W.2d 43 (Mo. App. 1969). The case cited neither *Knight Oil* nor *Keystone Laundry*.

187. See notes 92, 102, 114, 115 *supra*.

188. *State ex rel. Jones v. Ralston Purina Co.*, 358 S.W.2d 772, 776 (Mo. 1962).

ernment to make more open disclosures of matters formerly regarded as confidential,¹⁸⁹ it is possible that such pressure for greater disclosure will extend to corporations. Many social commentators have expressed suspicion of the tremendous concentration of corporate power which is hidden from public view.¹⁹⁰ Perhaps this concern for greater information on corporate power and practices will yet persuade Missouri courts to broaden the common law right to mandamus to make documents available. Perhaps there will even be a shift to align mandamus against corporate officers more squarely with mandamus doctrines regarding public officials. This view is articulated by Adolf Berle: "The corporation is now essentially a nonstatist political institution, and its directors are in the same boat with public office-holders."¹⁹¹

Another possible development in the availability of mandamus against corporations in Missouri could emerge from the long-dormant public-duty doctrine. As discussed earlier, Missouri law possesses an old line of cases in which mandamus issued to compel certain regulated industries to perform clear duties.¹⁹² It is conceivable that this line of cases could be revitalized and extended to corporations in general.¹⁹³ One might well imagine possible applications of such a doctrine issuing mandamus to compel a corporation to comply with an anti-pollution statute, to order a private university to maintain order on its campus, or to compel a corporation to comply with a national price freeze. To extend this currently dormant line of cases would probably prove a controversial step in which courts would have to balance the interests of promoting corporate compliance with legal duties against the interests of

189. See St. Louis Globe-Democrat, March 9, 1972, at 1A (news article of presidential declaration of liberalized declassification procedures).

190. See A. BERLE, JR., *THE TWENTIETH CENTURY CAPITALIST REVOLUTION* 25-60 (1954); C.W. MILLS, *POWER, POLITICS AND PEOPLE* 110-39 (1963).

191. A. BERLE, note 190 *supra*, at 60.

192. See notes 57 and 58 *supra*.

193. The courts which developed the "public duty" rationale for mandamus against corporations may well have anticipated future extension of the rule. See *State ex rel. Payne v. Kinloch Tel. Co.*, 93 Mo. App. 349, 359, 67 S.W. 684, 686 (1902), where the court observed (emphasis added):

[T]he vital question seems to be always, whether a particular inference is justified by the existence of a condition which precludes the members of a community from negotiating for fair terms or forces them to dispense altogether with the service rendered by the party complained of (although their welfare imperatively requires that service), unless relieved by interposition of the public authorities. *Abuses of contract right must now and then be corrected, and they will require correction more frequently as population grows dense and commercial activities multiply.*

discouraging abuse of the writ by zealots seeking to harass private institutions.

Mandamus against public officials, however, is a far more probable area of change. *Knight Oil* and *Keystone Laundry* seem to pose a potentially sweeping challenge to the validity of traditional doctrines. To make an administrative or judicial decision which involves an error of law subject to correction by mandamus might greatly broaden the scope of the writ. The traditionalist, viewing these two cases with deep suspicion might adopt Harold Weintraub's critique of the "mistake of law" standard:

Illegality, as a term of defining unreasonable action, presents an attractive simplicity, standing by itself. Clothed, as it must be, with the paraphernalia of administrative action, and exercised in a factual context pursuant to statutory authority, it is somewhat less than easy to isolate the point of departure from legality.¹⁹⁴

Great numbers of administrative or judicial decisions would ordinarily involve interpreting the law.¹⁹⁵ Traditionally most of these decisions have remained outside the scope of mandamus, since mandamus would not issue to alter a plausible, good faith exercise of discretion and since a mistake of law was properly corrected on appeal through normal judicial channels.¹⁹⁶ But the "mistake of law" standard of *Knight Oil* and *Keystone Laundry* might expose traditionally secure discretionary decisions to review and alteration by mandamus. In the end the traditionalist might envision the disintegration of the ministerial/discretionary distinction resulting in conversion of mandamus into a generalized writ of review. The traditionalist would eschew such a broadened scope for mandamus as playing havoc with orderly administrative and judicial decision-making.¹⁹⁷

Others would applaud a broadened scope for the writ, however, and would charge that the traditional restraints on its scope are no longer reasonable or coherent in application. As long ago as 1935 a commentator on mandamus in Missouri suggested that the ministerial/discretionary distinction often amounted to the mere application of labels

194. Weintraub, *Development of Scope of Review in Judicial Review of Administrative Action: Mandamus and Review of Discretion*, 33 *FORDHAM L. REV.* 359, 373 (1965).

195. *Id.*

196. See notes 92 and 102 *supra*.

197. See notes 63, 71 and 110 *supra*.

to achieve a desired result in doing justice to the case.¹⁹⁸ One discussion of the *Keystone Laundry* case suggested that the case merely involved the maintenance of flexibility which has been characteristic of the writ through the years.¹⁹⁹ One scholar, Kenneth Davis, has been even more lavish in his praise of any shift away from traditional mandamus standards, calling for the outright discard of the ministerial/discretionary distinction which has heretofore served as the guiding standard in issuing mandamus to review administrative and judicial decisions.²⁰⁰ Davis is critical of the fact that by traditional doctrines mandamus issued when the interpretation of the statute was plain and the duty was ministerial but did not issue when the question was uncertain requiring discretion.²⁰¹ He views this situation as paradoxical:

The special skills which judges have by virtue of their training and experience may be brought into play when the interpretation is so plain that such skills are not needed, but may not be brought into play on the difficult problems of interpretation when the judges' skills are most needed.²⁰²

Davis sees the drift of modern law in mandamus cases as posing a fundamental choice between maintaining mandamus tradition and turning to equity tradition.²⁰³ He argues forcefully that traditional mandamus doctrines should be discarded as full of "useless historical intricacies."²⁰⁴ He urges courts to turn to the reasonable standards of equity in issuance of the writ.²⁰⁵ Davis would probably argue that bench and bar could more effectively utilize a writ of review based on familiar principles of equity, rather than a mutated mandamus which blends "historical intricacies" with indeterminate new standards of "unlawfulness" or "excess of jurisdiction."²⁰⁶

As yet Missouri courts have not decisively and irrevocably committed themselves to any such sweeping alteration of the writ of mandamus. The two deviating cases, *Knight Oil* and *Keystone Laundry*, may still

198. Note, *The Use of Mandamus in Missouri*, 20 ST. LOUIS L. REV. 346, 354 (1935).

199. 34 MO. L. REV. 408, 413 (1969).

200. K. DAVIS, ADMINISTRATIVE LAW § 23.11, at 350.

201. *Id.*

202. *Id.*

203. *Id.* § 23.12, at 361.

204. *Id.*

205. *Id.*

206. *Id.*

end up as mere aberrations without telling effect on the law. They may create only a minor flurry and readjustment of standards, or they may be the precursors of a critical realignment of the doctrines which have heretofore governed the writ of mandamus. The ultimate future of mandamus against judicial, administrative and corporate officers in Missouri remains to be determined by the courts and possibly the legislature of Missouri.²⁰⁷

207. For an example of one possible innovative use of mandamus, see Kleps, *Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions—1949-1959*, 12 STAN. L. REV. 554 (1960).

